

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOAQUIN BASURTO-ESPINO,

Defendant.

NO. CR-09-2046-EFS

**ORDER DENYING MOTIONS TO AMEND
PURSUANT TO F.R.CIV.P.15(a)(1)
AND FOR RELIEF PURSUANT TO
F.R.CIV.P. 60(b)(1) & (6)**

Before the Court, without oral argument, are Joaquin Basurto-Espino's Motion to Amend Pursuant to F. R. Civ. P. 15(a)(1) (ECF No. [62](#)), filed January 4, 2011, and Motion for Relief Pursuant to F. R. Civ. P. 60(b)(1) and (6) (ECF No. [63](#)), filed January 14, 2011.¹ Having reviewed the motions and applicable statutory and case law, the Court is fully informed and denies the motions.

On August 12, 2009, Mr. Basurto-Espino pled guilty to being an Alien in the United States After Deportation in violation of 8 U.S.C. § 1326. The Court sentenced Mr. Basurto-Espino on January 13, 2010, to fifty-

¹ The Court did not order the United States Attorneys' Office (USAO) to respond.

1 seven months in prison and two years of supervised release. (ECF No.
2 [45](#).) Mr. Basurto-Espino appealed his sentence, which the Ninth Circuit
3 affirmed as substantively reasonable; the Ninth Circuit's mandate took
4 effect on October 26, 2010. (ECF No. [58](#).)

5 On November 22, 2010, Mr. Basurto-Espino filed a Motion to Modify
6 Sentence Pursuant to 3582(c)(B)(2) (ECF No. [59](#)), asking the Court to
7 modify his sentence consistent with 1) a four-level downward departure
8 under U.S. Sentencing Guidelines § 5K3.1, and 2) a one-year sentence
9 reduction under section 5K2.0 because he is ineligible for certain
10 services due to his alien status. Recognizing that § 3582(c)(B)(2) does
11 not exist in Title 28, the Court construed the motion as one under 18
12 U.S.C. § 3582(c)(B)(2), but denied the motion.² (ECF No. [61](#).)

13 Yet, the Court recognized that Mr. Basurto-Espino's motion may be
14 construed as a habeas petition under 28 U.S.C. § 2255 to vacate, set
15 aside, or correct his sentence, but refused to construe the motion as a
16 § 2255 habeas petition unless directly informed by Mr. Basurto-Espino to
17

18 ² In denying Mr. Basurto-Espino relief under 18 U.S.C. §
19 3582(c)(B)(2), the Court found:

20 Because the current motion has not been filed by the Director
21 of the Bureau of Prisons, relief is not available under
22 subsection (1)(A). And Mr. Basurto-Espino's motion is not
23 based upon any amendment to the U.S. Sentencing Guidelines;
24 thus, he is not entitled to relief under subsection (2). Mr.
25 Basurto-Espino was sentenced on January 13, 2010; accordingly,
26 his November 30, 2010 motion is untimely for Rule 35 purposes.
See Fed. R. Crim. P. 35(a) (allowing a judgment to be corrected
within seven days of sentencing for an arithmetical, technical,
or other clear error).

(ECF No. [61](#).)

1 do so. The Court warned Mr. Basurto-Espino that he has *only one*
2 opportunity to file a habeas petition (absent the requirements for a
3 second or successive motion being met as set out in the statute) and must
4 file his habeas petition within § 2255's one-year statute of limitations.
5 See 28 U.S.C. § 2255.

6 Instead of filing a § 2255 habeas petition, Mr. Basurto-Espino filed
7 the instant two motions: 1) a motion to amend his prior motion under
8 Federal Rule of Civil Procedure 15(a)(1) (ECF No. [62](#)), and 2) a motion
9 to modify his sentence under Rule 60(b)(1) and (6) (ECF No. [63](#)).³ Taking
10 Defendant's second motion first, Mr. Basurto-Espino asks the Court to
11 modify his sentence pursuant to Rule 60(b)(1) and (6), which provides:

12 **(b) Grounds for Relief from a Final Judgment, Order, or**
13 **Proceeding.** On motion and just terms, the court may relieve
14 a party or its legal representative from a final judgment,
15 order, or proceeding for the following reasons:
16 (1) mistake, inadvertence, surprise, or excusable neglect; or
17 (6) any other reason that justifies relief.

18 Fed. R. Civ. P. 60. The Court can find no precedent providing a district
19 court, which has already sentenced a defendant and entered judgment, with
20 jurisdiction to review an alleged unconstitutional criminal conviction
21 and/or sentence under Rule 60(b)(1) or (6) - a *civil* rule. Therefore,
22 his motion to modify is denied.

23 Mr. Basurto-Espino's Motion to Amend Pursuant to F. R. Civ. P.
24 15(a)(1) (ECF No. [62](#)) asks the Court for leave to amend his prior Motion
25 to Modify Sentence Pursuant to 3582(c)(B)(2) (ECF No. [59](#)) because he now
26

27 ³ Mr. Basurto-Espino also acknowledges that his citation to 28
29 U.S.C. § 3582(c)(B)(2) was a clerical error: he meant to cite to 18
30 U.S.C. § 3582(c)(B)(2).

1 believes that the proper remedy is in Rule 60(b)(1) and (6). Because the
2 Court concludes that Rule 60(b)(1) and (6) does not provide the relief
3 Mr. Basurto-Espino seeks, the Court denies his motion.

4 As previously stated, the statute Mr. Basurto-Espino may rely upon
5 in seeking relief from his criminal judgment and conviction is 28 U.S.C.
6 § 2255. But because Mr. Basurto-Espino declined to file a § 2255 motion
7 for habeas relief after the Court's previous invitation to do so, the
8 Court again refuses to construe his Motion for Relief Pursuant to F. R.
9 Civ. P. 60(b)(1) and (6) (ECF No. [63](#)) as a § 2255 habeas petition. Mr.
10 Basurto-Espino is reminded that he must file his habeas petition within
11 § 2255's one-year statute of limitations. See 28 U.S.C. § 2255(f).
12 Accordingly, Mr. Basurto-Espino's § 2255 motion must be filed no later
13 than January 24, 2012.⁴

14 Accordingly, **IT IS HEREBY ORDERED:**

15 1. Mr. Basurto-Espino's Motion for Relief Pursuant to F. R. Civ.
16 P. 60(b)(1) and (6) (**ECF No. [63](#)**) is **DENIED**.

18 ⁴ "[T]he one-year limitations period for a federal prisoner who
19 does not file a petition for writ of certiorari begins to run when the
20 time for filing the petition expires." *United States v. Garcia*, 210 F.3d
21 1058, 1060 (2000). Here, Mr. Basurto-Espino appealed to the Ninth
22 Circuit; his appeal was denied and the judgment took effect October 26,
23 2010. Mr. Basurto-Espino was required to appeal that decision within
24 ninety days after the entry of judgment: January 24, 2011. See Sup. Ct.
25 R. 13. Thus, the time for filing Mr. Basurto-Espino's § 2255 habeas
26 petition is January 24, 2012.

1 2. Mr. Basurto-Espino's Motion to Amend Pursuant to F. R. Civ. P.
2 15(a)(1) (ECF No. [62](#)) is **DENIED**.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter
4 this order, and provide a copy to the USAO and Mr. Basurto-Espino at the
5 following address:

6 Joaquin Basurto-Espino
7 Reg. # 12960-085
8 USP Beaumont
9 P.O. Box 26030
10 Beaumont, TX 77720-6030

11 **DATED** this 23rd day of February 2011.

12 S/ Edward F. Shea
13 _____
14 EDWARD F. SHEA
15 United States District Judge

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